



NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: National Association of Tribal Historic Preservation Officers Comments on WT Docket No. 03-128

Dear Ms. Dortch:

The National Association of Tribal Historic Preservation Officers (NATHPO) is a national organization whose members are the Tribal Historic Preservation Officers approved by the Secretary of the Interior under section 101(d)(2) of the National Historic Preservation Act (NHPA) to assume the functions of the State Historic Preservation Officer on their Tribal lands. NATHPO membership also includes many tribes that support our goals and mission but as yet do not have a THPO program that assumes SHPO responsibilities. NATHPO has the following comments on the proposed "Nationwide Programmatic Agreement (PA) For Review of Effects On Historic Properties For Certain Undertakings Approved by the Federal Communications Commission."

General Statement:

Over the past three years, NATHPO has had limited participation in the FCC and the Advisory Council on Historic Preservation (ACHP) process that has led to this draft Programmatic Agreement. Although the current draft responds to many of NATHPO's previously expressed concerns, we are particularly concerned that our early and constant recommendation -- that the FCC and ACHP meet, consult, and work with tribes to achieve mutual understanding of this complex FCC process and how it will affect tribal governments -- was not achieved. While representatives of a few Tribes substantively participated in the process, this option was afforded to those tribes that had the resources to devote a substantial amount of time to the process. It is our belief that if the FCC had conducted meaningful consultations with Tribal governments, the result of that work would have created a process that would adequately serve all concerned parties. The publication of the Notice of Proposed Rulemaking may satisfy requirements to seek public comment, but it does not constitute or substitute for consultation with Tribal governments in developing policies that will affect all Indian tribes and Native Hawaiian organizations (NHOs).

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Specific Comments:

The 7th “Whereas” clause on creation of a “Working Group,” does not adequately or accurately explain that this was not an open process, but one that was created by invitation only participation.

The 13th “Whereas” clause, which states that “the Commission has consulted with Indian tribes regarding this Nationwide Agreement;”... is a material misstatement and must be deleted.

The PA deals directly with many tribal historic preservation issues, but it has been crafted with minimal tribal input. The Notice of Proposed Rulemaking specifically requests comments on a number of specific issues raised in meetings, but not resolved, by the Working Group process. Many of these issues directly relate to Tribal participation and to the measures to alleviate Tribal concerns. NATHPO believes that these questions can not be answered without substantial Tribal engagement and feedback, which is not likely a result of the FCC’s publication of the NPRM or that which will occur in the absence of direct consultation with Indian tribes and NHOs.

NATHPO strongly urges the FCC to withdraw this proposed action, and immediately undertake a program of active, direct, face-to-face consultations with Tribal governments and NHOs prior to taking further action on the PA.

NATHPO believes that such consultations are required by the National Historic Preservation Act, the Advisory Council on Historic Preservation’s regulations, as well as FCC policy. NATHPO is also convinced that such consultations are likely to resolve many of the issues that concern the FCC and the industry.

While the 16th “Whereas” clause asserts that the FCC is not delegating its responsibility to consult with Indian Tribes, the body of the PA is not consistent with this assertion.

In addition, the 17th “Whereas” asserts that the PA does not “abrogate the rights of Indian tribes or NHOs to consult directly with the Commission regarding the construction of facilities....”

While this statement may be correct in the narrowest sense, the PA turns this FCC responsibility onto the Tribes and makes the Tribes request or demand FCC’s involvement. The FCC has an affirmative responsibility to consult with Tribes and NHOs. Absent a Tribal demand to the FCC, the proposed process leaves all “consultation” up to the applicants and their consultants. This is not appropriate, certainly not without the benefit of extensive Tribal consultation and mutually acceptable procedures.

Stipulation I.D. is confusing and potentially subject to substantial misinterpretation. NATHPO suggests that it be carefully edited for clarity.

Stipulation IV.Alternative A. and B. NATHPO applauds USET’s efforts to develop an alternative process and proposes that their work be used as one of the starting points for future discussions and meetings with Indian tribes and NHOs.

NATHPO notes that the industry representatives and the ACHP object to the Navajo Nation's proposed notice requirement for activities exempted under Stipulation III. (III.B.) The industry objects that, as proposed, the applicant is required to engage in full blown consultation for all these activities and consequently, nothing is actually exempted and there is no streamlining. However, the Navajo Nation has only proposed that Tribes be notified of such activities and given the opportunity to express concerns. Only after a Tribe expresses a concern would there ever be a need to enter into consultation.

NHPA Section 101(d)(6) contains an unequivocal directive to Federal agencies to consult with Tribes any time an undertaking may affect a place of traditional religious and cultural significance to the Tribe. Neither the FCC nor the ACHP can use a PA to void this statutory requirement. In the interests of "streamlining" the process, the Navajo Nation has to substitute notice for consultation. This hardly seems excessive.

The ACHP supports the industry by stating that it has entered into other Nationwide PAs, which do not contain notice requirements to Tribes. The fact that ACHP has been (and apparently remains) willing to enter into Programmatic Agreements that are not consistent either with 36 CFR Part 800 or the plain language of the NHPA is not on point. ACHP's startling admission is completely irrelevant to the proposed FCC action. That ACHP has previously executed PAs that violate the law provides no justification for the FCC to propose such an agreement or for ACHP to continue to enter such agreements when they clearly violate the language of NHPA.

Sincerely,

D. Bambi Kraus, President